Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

IRENE FLICK,

Petitioner,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Are the flood insurance premium dollars which are segregated, accumulated and retained in the National Flood Insurance Fund [NFIF] for payment of flood insurance claims under the National Flood Insurance Program [NFIP] and for payment of NFIP operating expenses "**Treasury dollars**" which are subject to the exclusive control of Congress as provided in the Appropriations Clause of the U.S. Constitution [Article I, Section 9, Clause 7]? Or are they "**policyholder dollars**" which are subject to judicial enforcement of the terms of the policyholder's flood insurance contract according to ordinary principles of contract law and insurance law?

If policyholder dollars in the NFIF, which is "located in" [but not a "part of"] the Treasury **are** subject to the limitations imposed by the Appropriations Clause on the Judiciary, are the policyholder premium dollars retained for claims and expense payments by private insurers in their own accounts outside of the U.S. Treasury also subject to the limitations of the Appropriations Clause?

PARTIES TO THE PROCEEDING

Petitioner is property owner and National Flood Insurance policyholder, IRENE FLICK, who was the plaintiff in the District Court and the appellant in the Ninth Circuit Court of Appeals.

Nominal respondent is Liberty Mutual Fire Insurance Company, who at all stages of the proceedings has been defended by FEMA, and who was the defendant in the District Court and the appellee in the Ninth Circuit Court of Appeals.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion (App. A) is reported at *Irene Flick v. Liberty Mutual Fire Insurance Company*, 205 F.3d 386 (9th Cir. 2000). The District Court opinion (App. B) is unpublished.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of appeals was entered on February 15, 2000. The Court of Appeals entered an order denying a timely petition for rehearing and petition for rehearing en banc on March 29, 2000 (App. C). Flick's application for an extension of time within which to file a petition for writ of certiorari in the above-entitled case was granted to and including July 27, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Appropriations Clause of the Constitution of the United States, Article 1, Section 9, Clause 7, which provides in relevant part:

> No money shall be drawn from the Treasury, but in consequence of appropriations made by law; . . .

The case also involves assorted provisions of the National Flood Insurance Act of 1968, as amended, and the Flood Disaster Protection Act of 1973, as amended, 42 U.S.C. § 4001, *et seq*.

STATEMENT OF THE CASE

Flick v. Liberty Mutual stands out as the first and only case in United States history which has stretched the Appropriations Clause of the United States Constitution to deprive parties to private insurance contracts of a forum to adjudicate claims controversies and to exempt insurance contracts between private parties from ordinary rules of contract law and insurance law. If for no other reason, certiorari should be granted to rein in this dangerous, unnecessary, and unwarranted excursion into judicial activism for the benefit of private industry.

Certiorari should also be granted to bring to an end twenty years of harsh doctrine built on the mistaken belief that the National Flood Insurance Program (NFIP) is subsidized by the taxpayers.

Throughout these proceedings the following have been undisputed:

1. Flick's claim for flood-induced subsidence damage to her home was within the coverage of the flood insurance policy issued by Liberty Mutual;

2. Strict compliance with the 60-day proof-of-loss requirement in the policy was **not possible** because of the complex engineering and design process which had

to be undertaken to satisfy the proof-of-loss requirement for an accurate assessment of the amount of loss;

3. Strict compliance with the 60-day proof-of-loss requirement would almost always be **impossible** in cases of flood-induced ground subsidence (205 F.3d at 397);

4. Flick promptly and diligently provided all required claim information to Liberty Mutual and Liberty Mutual suffered no prejudice by any of Flick's delays;

5. Under ordinary principles of insurance law applicable in a majority of states, including California, Flick's right to coverage could not be forfeited under the proof-of-loss clause because she substantially complied with proof-of-loss requirements and there was no prejudice to the insurer.

In the District Court, Flick argued that lack of strict compliance with the 60-day proof-of-loss requirement was not a defense to coverage under "ordinary principles of insurance law and contract law" where strict compliance was **impossible** and the requirements of the notice/prejudice rule as prescribed by "ordinary principles of insurance law" had been satisfied (CR 54).

Liberty Mutual replied that **impossibility was no excuse** for failure to strictly comply with the 60-day proof-of-loss requirement because NFIP policies issued by the federal government or its private industry affiliates are not governed by ordinary principles of insurance law or contract law (CR 56).

The trial court agreed with Liberty Mutual (App. B).

On appeal to the Ninth Circuit Flick argued that the harsh doctrines adopted by a bare majority of a deeply divided U.S. Supreme Court in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), which were justified on the grounds that Federal Crop Insurance was subsidized by the taxpayers, should never have been extended to policyholder claims under the National Flood Insurance Program because NFIP's own published data, the enabling legislation, and the public pronouncements of the director of the NFIP showed that the NFIP was **not** subsidized by the taxpayers. Flick further pointed out that the NFIP was, in fact, completely self-sustaining from policyholder premiums, that it was designed to continue to be completely self-sustaining from policyholder premiums, and that adjustments in the program had been and were being made periodically to assure that the program would continue to be self-sustaining.

For reasons which are not entirely clear, the majority chose to ignore the NFIP data and pronouncements and attempted to perpetuate the harsh traditions which began with *Merrill* on the grounds that taxpayers might "someday" be called upon to subsidize the NFIP (205 F.3d at 393).

Apparently fearing that the absence of a taxpayer subsidy for the NFIP might eventually be demonstrated, the majority in Flick went on to argue that, even if the NFIP was shown to be self-sustaining, the federal courts were powerless to apply ordinary principles of contract and insurance law to claims disputes under NFIP insurance contracts because policyholder premiums are accumulated and retained in the National Flood Insurance Fund (NFIF) which is "located in the Treasury" and is therefore governed by the

Appropriations Clause (205 F.3d at 395). The majority never did explain how the National Flood Insurance Fund could borrow from and pay interest to the U.S. Treasury (205 F.3d at 392 n.6) and, at the same time be a "part of" the U.S. Treasury which is subject to the Appropriations Clause. The published pronouncements of the NFIP, of course, have no trouble distinguishing between flood insurance premium dollars which are retained in the NFIF and "taxpayer dollars" which are retained in the U.S. Treasury. See, for example, the Federal Emergency Management Administration (FEMA) announcement of September 23, 1999 which states:

> **Taxpayers reap the benefit**. Because the NFIP uses flood insurance premium dollars, not taxpayer dollars, to pay claims and operating expenses, all taxpayers benefit when flood victims have flood insurance. The NFIP reduces federal disaster assistance outlays by enabling people to insure against flood losses rather than relying on costly Federal disaster assistance and tax write-offs for uninsured losses. Since 1978, almost $8.3 billion in flood losses have been paid from premiums, thereby reducing the burden on the taxpayer.

(Announcement currently published at http://www.fema.gov/nfip/reform.htm)

REASONS FOR GRANTING THE WRIT

I.

THE OPINION OF THE MAJORITY WITH REGARD TO THE APPROPRIATIONS CLAUSE CONFLICTS WITH THE EXPRESS GRANT OF DISTRICT COURT JURISDICTION OVER NFIP CLAIMS CONTROVERSIES.

42 U.S.C. § 4072 provides:

> §4072. *Adjustment and payment of claims; judicial review; limitations; jurisdiction*
>
> In the event the program is carried out as provided in section 4071 of this title, the Director shall be authorized to adjust and make payment of any claim for proved and approved losses covered by flood insurance, and upon the disallowance by the Director of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, the claimant, within one year after the date of mailing of notice of disallowance or partial disallowance by the Director, may institute an action against the Director on such claim in the United States district court in the district in which the insured property or the major part thereof shall have been situated, and original exclusive jurisdiction is hereby conferred upon such court to hear and determine such action without regard to the amount in the controversy.

Nothing in that section or in any other section of the enabling legislation suggests that the **power** of the U.S. District Court

to adjudicate NFIP claims controversies is limited in any way by the nature of the claims controversy or by the Appropriations Clause. If Congress had intended that the scope of judicial review be limited by the Appropriations Clause or that it be limited to controversies not involving the 60-day proof-of-loss requirement, it could have and presumably would have said so.

Although the majority opinion in *Flick* acknowledges the exclusive jurisdiction of the Federal District Court over NFIP claims disputes it would have us believe that the courts are, nevertheless, rendered powerless by the Appropriations Clause to adjudicate any such claims.

The opinion of the majority with regard to the Appropriations Clause was apparently inspired in part by the decision of this Court in *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990). In the *Richmond* case, this Court concluded that the Appropriations Clause limited the power of the judiciary to order the payment of disability benefits to a federal employee. In that case, the funds would have been derived exclusively from taxpayer funds in the U.S. Treasury. The majority in *Flick* either failed to recognize or failed to acknowledge that NFIP claims are not paid from taxpayer funds but are paid out of the policyholder premiums held either by the private insurer issuing the policy or from the National Flood Insurance Fund.

The breadth of the Appropriations Clause perhaps became further blurred in *Republic National Bank of Miami v. United States*, 506 U.S. 80 (1992) when this Court failed to reach a clear consensus as to the extent of the application of the Appropriations Clause to seized property.

Certiorari should therefore be granted to resolve any lingering uncertainty as to the breadth of the Appropriations Clause and to clearly establish that the Federal District Court not only has the responsibility to decide all aspects of NFIP claims controversies according to "standard insurance law principles", but that it has the power to do so.

II.

THE HARSH DOCTRINES DERIVED FROM *FEDERAL CROP INSURANCE CORPORATION v. MERRILL*, 332 U.S. 380 (1947) SHOULD BE EXPRESSLY ABANDONED IN LIGHT OF THE SELF-SUSTAINING DESIGN OF THE NFIP PROGRAM AND THE NFIP RECORD WHICH DEMONSTRATES THAT IT HAS BEEN AND VERY LIKELY WILL CONTINUE TO BE SELF-SUSTAINING.

The harsh doctrines in the NFIP cases prior to *Flick* simply ignored the fact that payments were made out of separate, segregated policyholder funds and characterized the loss payments as "a direct charge on the public treasury" *Gowland v. Aetna*, 143 F.2d 951 (5th Cir. 1998) and stated without any factual basis that the NFIP program is "federally subsidized" (*Id.* at 143 F.3d 955).

Nearly every published opinion in NFIP cases prior to *Flick* attempted to justify harsh results by the following quote from the majority opinion in *Merrill* at 332 US 385:

> The oft-quoted observation in *Rock Island Arkansas and Louisiana Railroad Company vs. United States*, 254 U.S. 141, 143, that "men must turn square corners when they deal with the

> government" does not reflect a callous outlook, it merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury.

None of those opinions, however, considered the possibility that NFIP loss payments whether made out of premiums retained by private insurers or out of the National Flood Insurance Fund were not in fact "charges against the public treasury" but simply indemnity disbursements from policyholder funds as opposed to taxpayer funds.

It is time for the Courts to recognize that the taxpayers are not subsidizing the NFIP but are in fact benefitting from it in variety of ways. It is also time to recognize that, against this background, there is no longer any justification for "harsh and unworkable" rules governing NFIP loss payments to flood victims and that NFIP contracts should be governed by "ordinary principles of insurance law and contract law".

CONCLUSION

By its own account:

> The NFIP is now one of the largest property and casualty insurers in the Nation. In fact, it is the largest single-line insurer, with over 4 million polices in effect nationwide and $485 billion in coverage.

(Announcement currently published at http://www.fema.gov/nfip/jahsp3.htm).

If the majority opinion in *Flick* is allowed to stand, one of the largest insurance programs in the Nation will be left without a forum to adjudicate claims controversies. Certiorari should therefore be granted to assure that the Federal District Courts will continue to have not only the jurisdiction but the power to decide all aspects of NFIP claims controversies in accordance with general principles of insurance law and contract law.

Respectfully submitted,

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